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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. CRAIG ANTHONY ROHLA, Appellant.	2 CA-CR 2006-0275 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20053979

Honorable Richard Nichols, Judge

AFFIRMED

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V Á S Q U E Z, Judge.

¶1 After a jury trial, Craig Rohla was convicted of possession of a dangerous drug and possession of drug paraphernalia. Finding he had four historical prior felony convictions pursuant to A.R.S. § 13-604, the trial court sentenced him to a total of nine years in prison. On appeal, Rohla challenges his conviction for possessing a dangerous drug, arguing it was not a lesser included offense of the original charge of transporting a dangerous drug for sale. He also contends the trial court improperly enhanced his sentences because the state failed to prove his prior convictions beyond a reasonable doubt. For the reasons that follow, we affirm.

Facts and Procedural Background

¶2 On September 21, 2005, two Tucson police officers observed an older model truck being driven by Rohla westbound on Flower Road. After conducting a license plate check that revealed the truck had been stolen, the officers followed Rohla into a parking lot and initiated a traffic stop. As Rohla got out of the truck, the officers ordered him to get on the ground. Rohla responded by walking from the driver's side to the front of the vehicle and ducking down behind it. The officers then approached the front of the truck from both sides and saw that Rohla had crawled partially underneath it. One of the officers observed a large knife in Rohla's waistband. After Rohla crawled out from under the truck, the officer handcuffed and searched him, finding in his pockets a glass pipe, ledger, and plastic bag with many smaller "baggies" inside of it. Rohla was then informed of his rights pursuant to

Miranda.[1] During a search of the truck, the officers found a digital scale and a glass pipe. On the ground under the truck, they found a dollar bill and a large plastic baggie containing over nine grams of methamphetamine.

¶3 Rohla was charged with theft of a means of transportation, third-degree burglary, possession of burglary tools, transportation of a dangerous drug for sale, and possession of drug paraphernalia. The state also alleged numerous prior felony convictions for sentence-enhancement purposes. The jury acquitted Rohla of theft of a means of transportation, burglary, possession of burglary tools, and transporting a dangerous drug for sale but found him guilty of possession of drug paraphernalia and possession of a dangerous drug. The trial court had instructed the jury over Rohla's objection that the latter was a lesser included offense of transportation for sale. The jury also found Rohla had four prior convictions. After finding the convictions qualified as historical prior felony convictions, the court sentenced Rohla to an enhanced, slightly mitigated, nine-year prison term for possessing a dangerous drug and to a concurrent, enhanced, presumptive term of 3.25 years for possessing drug paraphernalia. This appeal followed. We have jurisdiction pursuant to A.R.S. § 13-4033(A).

Lesser included offense

¶4 Rohla argues his "conviction for possession of a dangerous drug must be reversed because that offense is not a lesser-included offense of transportation of a

[1]*Miranda v. Arizona*, 384 U.S. 436 (1966).

dangerous drug for sale." And he contends the charged offense did not afford him adequate notice that he could also be tried for possession of a dangerous drug, in violation of the Sixth Amendment of the United States Constitution and article II, §§ 24 and 30 of the Arizona Constitution. In support of this argument, he relies on this court's decision in *State v. Cheramie*, 217 Ariz. 212, ¶¶ 7, 11, 171 P.3d 1253, 1256 (App. 2007), in which we held that possession of a dangerous drug was not a lesser included offense of transportation of a dangerous drug for sale. However, our supreme court subsequently vacated that portion of our decision, holding that possession is a lesser included offense of transportation for sale. *State v. Cheramie*, ___ Ariz. ___, ¶ 22, 189 P.3d 374, 378 (2008). Therefore, *Cheramie* does not support Rohla's contention.

¶5 "[A] defendant is deemed to have notice of crimes necessarily included in the offense with which he is charged." *Id.* ¶ 7. Here, Rohla was charged with transporting a dangerous drug for sale. He therefore had notice of all lesser included offenses, including possession of a dangerous drug. *See id.* ¶ 22. The trial court did not err in submitting that offense to the jury.

Proof of historical prior felonies

¶6 Rohla next argues the state failed to prove he had two or more historical prior felony convictions under § 13-604(W)(2)(c)[2] and, as a result, the trial court improperly

[2]We note that § 13-604 has been amended since Rohla committed these offenses. We therefore cite to that statute as it existed at that time. 2005 Ariz. Sess. Laws, ch. 188, § 1.

enhanced his sentences. The court found that all four of Rohla's prior convictions constituted historical prior felony convictions. In his opening brief, Rohla concedes that "[o]n cross examination, [he] admitted having previously been convicted of four felonies."[3] But he nonetheless contends the state did not elicit sufficient information to prove the convictions were historical prior felony convictions within the meaning of § 13-604(W)(2).[4]

¶7 Because Rohla did not make this objection below, we review only for fundamental, prejudicial error. *State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005); *State v. Robles*, 213 Ariz. 268, ¶ 12, 141 P.3d 748, 752 (App. 2006). However, "[t]he failure to impose a sentence in conformity with mandatory sentencing

[3]In his reply brief, Rohla suggests that he did not expressly admit at trial that three of the four offenses were felonies and claims they could have been charged as misdemeanors. Therefore, he argues, there was insufficient evidence to prove his prior convictions were felonies. Because he failed to present this argument in his opening brief, it is waived. *See State v. Styers*, 177 Ariz. 104, 113, 865 P.2d 765, 774 (1993). Additionally, we note from the context of Rohla's testimony that both the jury and the trial court could reasonably infer that he had admitted the convictions were felony convictions.

[4]Rohla argues that a discrepancy between his testimony and the presentence report concerning the substance of the offense he committed in CR99-018438 "vitiate[d] the jury's finding of a prior conviction in that case and the trial court's use of the alleged conviction for enhancement." We disagree. Although the presentence report indicates this offense was for weapons misconduct, at trial Rohla admitted to a "marijuana" conviction in that cause number, which is the same offense the state had alleged for that cause number. Therefore, sufficient evidence supported the jury's verdict. *See State v. Brown*, 204 Ariz. 405, ¶ 4, 64 P.3d 847, 849 (App. 2003) (defendant's admission of prior conviction during trial is strongest evidence of such conviction). In any event, the jury and trial court were entitled to believe Rohla's own testimony. And, faced with a conflict between that testimony and a presentence report, the trial court was responsible for resolving the disparity. *See State v. Canez*, 202 Ariz. 133, ¶ 114, 42 P.3d 564, 594 (2002) (trier of fact in best position to assess evidence).

statutes makes the resulting sentence illegal." *State v. Carbajal*, 184 Ariz. 117, 118, 907 P.2d 503, 504 (App. 1995). And, "[i]mposition of an illegal sentence constitutes fundamental error." *State v. Thues*, 203 Ariz. 339, ¶ 4, 54 P.3d 368, 369 (App. 2002); *see also State v. Cox*, 201 Ariz. 464, ¶ 13, 37 P.3d 437, 441 (App. 2002).

¶8 In this case, Rohla was convicted of possessing a dangerous drug, a class four felony, and possessing drug paraphernalia, a class six felony. Section 13-604(C) generally permits the sentence enhancement imposed here upon the conviction of a class four, five, or six felony if a defendant has two or more historical prior felony convictions. Section 13-604(W)(2)(c) defines an historical prior felony conviction as one that was "committed within the five years immediately preceding the date of the present offense." Rohla asserts he had committed three of these four prior offenses more than five years before the present offenses. Thus he contends the state was required, but failed, to prove that he had either been incarcerated or had absconded during this time to bring those convictions within the five-year time limit imposed by § 13-604(W)(2)(c).[5]

¶9 Rohla committed the current offenses on September 21, 2005. At trial, he admitted having prior felony convictions, all in Maricopa County, for possession of

[5]Rohla also suggests that requiring prior convictions to be proven only by clear and convincing evidence does not satisfy the Due Process Clauses of the United States and Arizona Constitutions. *See* U.S. Const., amends. V, XIV; Ariz. Const., art. II, § 4. But he fails to support this claim with any argument or citation to authority, and, in any event, the jury in fact found his prior convictions proven beyond a reasonable doubt. Therefore, in our discretion, we do not consider this argument. *See State v. Cruz*, 218 Ariz. 149, n.3, 181 P.3d 196, 205 n.3 (2008); Ariz R. Crim. P. 31.13(c)(1)(vi), (e).

marijuana in cause number CR01-018697, committed October 5, 2001; possession of marijuana in cause number CR99-018438, committed on July 10, 1999; possession of a dangerous drug in cause number CR99-010444, committed on June 19, 1998; and possession of marijuana in cause number CR96-09897, committed on September 10, 1996. Thus, only CR01-018697 automatically qualified as an historical prior conviction under § 13-604(W)(2)(c) as a conviction for an offense committed within five years of the present offenses. For the remaining convictions to qualify under that subsection, the state was required to prove they had occurred within five years of the present offense after excluding any time Rohla had spent incarcerated or as an absconder.

¶10 Although Rohla admitted the convictions, the prosecutor did not ask him how much time, if any, he had spent incarcerated or absconding; nor did the state introduce certified copies of his prior convictions, which would have supplied that information. The presentence report apparently contained the information, but, contrary to the state's contention, a presentence report is insufficient to support enhancing a defendant's sentence. *See State v. Richards*, 166 Ariz. 576, 579, 804 P.2d 109, 112 (App. 1990) (trial court cannot enhance sentence based on presentence report); *see also State v. Hurley*, 154 Ariz. 124, 132, 741 P.2d 257, 265 (1987) (trial court's finding offense committed while on release must be supported by same reliable, documentary evidence required to prove prior

convictions). In short, the evidence here was insufficient for the trial court to conclude these convictions qualified as historical prior convictions under § 13-604(W)(2)(c).[6]

¶11 However, there are other ways in which a prior conviction can qualify as an historical prior felony conviction under § 13-604(W)(2). Section 13-604(W)(2)(d) provides that a "third or more" prior felony conviction qualifies as an historical prior felony conviction, and it does not include any time limitations. The determination is made by counting forward in chronological order from the oldest prior conviction to the newest. *State v. Decenzo*, 199 Ariz. 355, ¶ 9, 18 P.3d 149, 152 (App. 2001); *State v. Garcia*, 189 Ariz. 510, 515, 943 P.2d 870, 875 (App. 1997). Therefore, only CR01-018697 and C499-018438—Rohla's third and fourth previous convictions—qualify as historical prior felony convictions under subsection (d). And, although the conviction in CR01-018697 qualifies under both subsections (c) and (d), it may only be counted once. *See Decenzo*, 199 Ariz. 355, ¶ 9, 18 P.3d at 152; *Garcia*, 189 Ariz. at 515, 943 P.2d at 875.

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[6]We decline the state's invitation to take judicial notice of any Maricopa County Superior Court records concerning Rohla's prior convictions. Although an appellate court may, under certain circumstances, take judicial notice of superior court records when the trial court did not, *see State v. Cook*, 150 Ariz. 470, 474, 724 P.2d 556, 560 (1986), we will not do so here, where the records are not part of the record on appeal nor otherwise immediately available to us. *See* Ariz. R. Evid. 201 (judicially noticed fact must not be subject to reasonable dispute such that it is susceptible to "accurate and ready determination"); *see also State v. Rojers*, 216 Ariz. 555, ¶¶ 25-26, 169 P.3d 651, 656 (App. 2007) (taking judicial notice where official police procedures publicly available on internet; noting court's taking judicial notice discretionary).

¶12 The trial court erred in finding the convictions in CR99-010444 and CR96-09897 constituted historical prior felony convictions, but that error was neither fundamental nor prejudicial. The state was only required to prove Rohla had two prior convictions for the court to enhance his sentences under § 13-604(C). Rohla's sentences were therefore properly enhanced and not illegal. *See Carbajal*, 184 Ariz. at 118, 907 P.2d at 504; *Thues*, 203 Ariz. at 339, ¶ 4, 54 P.3d at 369.

Disposition

¶13 For the reasons stated above, we affirm Rohla's convictions and sentences.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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PHILIP G. ESPINOSA, Judge